Supreme Court, U.S.
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CLERK

No. 01-997

IN THE

Supreme Court of the United States

ANN MARK,

Petitioner,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, NEW YORK STATE RETIREMENT FUND and NEW YORK CITY PENSION FUNDS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT CENDANT CORPORATION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Cendant Corporation has no corporate parent and no publicly-held company owns ten percent or more of its stock.

Respondent Cendant Corporation ("Cendant") respectfully submits this brief in response to the Petition for a Writ of Certiorari by petitioner Ann Mark ("Mark").

STATEMENT OF THE CASE

In the interests of brevity, Cendant limits its Statement of the Case only to those facts that bear directly to the subject matter of this brief.

As Mark notes in her Petition for a Writ of Certiorari (the "Petition"), several parties who sought appointment as lead plaintiff in this action asserted that the three plaintiffs who were ultimately appointed by the district court to represent the putative class "would be motivated to 'tilt' the litigations in favor of recovery" on claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) ("Section 10(b) claims"), at the expense of claims under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k ("Section 11 claims"). Petition at 6 (citing Pet. App. 271a). Mark, however, was not one of the parties who raised this argument before the district court.

Additionally, Mark did not challenge the district court's order certifying the class in this action – which did not create sub-classes – at the time that order was entered.

When the parties to this action reached a settlement, however, Mark objected to the plan of allocation of the settlement proceeds among the members of the previously certified class. She argued that the plan of allocation, which was prepared exclusively by the lead plaintiffs, did not fairly apportion the settlement proceeds between those class members who possessed Section 11 claims and those who possessed only Section 10(b) claims, and requested that she be appointed lead plaintiff on behalf of a sub-class of persons with Section 11 claims for purposes of negotiating a new plan of allocation. Mark did not object to the terms of the settlement itself.

The district court overruled Mark's objections to the plan of allocation, and Mark appealed, again challenging only the plan of allocation and seeking appointment as lead plaintiff on behalf of a sub-class of persons with Section 11 claims for purposes of negotiating a new plan of allocation. The court of appeals affirmed the district court's rulings as they related to Mark's objection, and Mark then filed her Petition in this Court.

ARGUMENT

Cendant takes no position on whether this Court should grant Mark's Petition to review any questions properly brought before the Court by Mark.

However, since Mark's Petition contains arguments that could be perceived to challenge the district court's certification of the class in this action in the first instance (an issue on which Mark took no position at the time it was decided) and the overall adequacy of the settlement Cendant reached with the representatives of that class (to which Mark never objected), Cendant submits this response to clarify the issues that would properly be before the Court if the Petition were granted. *See* Sup. Ct. R. 15.2.

Although "[a] litigant seeking review in this Court . . . possesses the ability to frame the question to be decided in any way [s]he chooses," she is limited to raising only those questions "properly raised in the lower courts." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Here, as described above, the only issues "properly raised in the lower courts" by Mark were those relating solely to the plan of allocation, not to the terms of the settlement of this action or to the district court's original decisions certifying the class or appointing the class representatives with which Cendant negotiated the settlement. Accordingly, the only questions

that Mark can properly place before this Court are those relating to the plan of allocation, and not any additional questions that would require the Court to consider the issues of class certification, the appointment of the lead plaintiffs or the fairness, adequacy or validity of the settlement itself.

CONCLUSION

For the foregoing reasons, Cendant respectfully requests that, if the Court grants Mark's Petition, it limit its review to Mark's specific objections to the plan of allocation.

Respectfully submitted,

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